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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 366

THE PHILIP CAREY MANUFACTURING COMPANY (MIAMI CABINET DIVISION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–32a) is reported at 331 F. 2d 720. The Board's decision and order (J.A. 1a–72ad) [1] are reported at 140 NLRB 1103.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1964, and on May 5 and May 13, 1964, the court denied petitions for rehearing. On June

[1] "J.A." references are to the portions of the record printed for the use of the court below and filed with the petition.

26, 1964, Mr. Justice Stewart extended the time for the filing of a petition for a writ of certiorari to and including August 11, 1964 (Pet. 2). The petition was filed on August 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's findings that the Company unlawfully refused to bargain and to reinstate certain strikers were based on events which occurred more than six months prior to the filing and service of the unfair labor practice charges, contrary to Section 10(b) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 32a–34a of the petition.

STATEMENT

A. THE BOARD DECISION

On March 17, 1960, the Board certified the Union [2] as the bargaining representative of the production and maintenance employees at the Middletown, Ohio, plant of petitioner company (J.A. 17a, 33a–34a; 655a, 662a). Thereafter, the parties engaged in extensive bargaining. On July 28, at the eleventh meeting, the Company, after having considered the Union's proposals

[2] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW–AFL–CIO, and its Local 689.

and made counterproposals, submitted a new proposal which it described as a "final offer" (J.A. 3a, 18a, 19a–21a; 92a, 460a–461a, 525a). In seven further meetings, the Company declined to alter its proposal in any material respect (J.A. 4a, 37a–39a; 94a–96a, 241a, 275a–280a, 362a, 371a, 472a, 520a). On September 6, the Union called a strike (J.A. 4a–5a, 26a; 368a–370a, 398a–399a, 486a–499a). The parties continued meeting during the strike, but negotiations broke off on December 28 when the Company insisted upon superseniority for nonstrikers and replacements for strikers (J.A. 6a, 30a, 48a; 287a, 504a–505a).[3]

On August 3, 1961, the Union sent the Company unconditional written offers to return to work on behalf of 122 named strikers (J.A. 7a, 30a–31a; 700a–702a). On August 9, the Company replied that it had rehired 15 of the strikers on August 7. was denying reinstatement to 10 of the strikers because of misconduct, and had permanently replaced the rest (J.A. 31a; 723a–724a). The next day, the Company advised the Union

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[3] The superseniority proposal was first made in a letter from the Company to the Union (copies of which were sent to the employees) on September 26, 1960 (J.A. 6a, 27a, 44a; 110a, 683a–685a). The Company repeated its demand for superseniority in a meeting on November 23 (J.A. 6a, 45a–46a; 286a–287a, 333a, 502a–503a, 551a, 620a–621a).

The Company had begun hiring replacements on October 12, 1960 (J.A. 28a; 492a). By November 22, it had replaced about one-third of the strikers (J.A. 29a, n. 22; 550a). By February 1, 1961, the Company had almost completely restaffed (J.A. 30a; 723a–724a, 733a–735a).

that it was withdrawing its superseniority proposal,[4] and that, with this deletion, it was renewing its "most recent contract proposal" (J.A. 6a, 31a; 101a, 103a–106a, 505a–506a, 512a, 514a–515a, 681a). The parties met on August 23 and September 7. The Union declared its willingness to accept the Company's contract proposal, except for provisions forfeiting the seniority rights of permanently replaced strikers and barring them from the grievance procedure. The Company refused to yield on these provisions, and there were no further meetings. (J.A. 6a, 32a–33a; 288a–290a, 378a–379a, 411a, 414a, 416a–417a, 506a–508a, 677a–680a.)

The Board found that there was good faith bargaining until December 28, 1960, when the Company violated Section 8(a)(5) of the Act by insisting upon the unlawful superseniority provision; that this illegal action had the effect of prolonging the strike, which was economic at its inception; and that, as of December 28, 1960, the strike was thus converted into an unfair labor practice strike (J.A. 3a–8a).[5] The

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[4] On July 31, 1961, the Board had issued its decision in *Erie Resistor Corp.*, 132 NLRB 621, holding that granting superseniority to employees who worked during a strike was an unlawful form of discrimination, and that therefore an employer could not properly insist upon such a provision as a condition of negotiating an agreement. The Board's decision was subsequently upheld by this Court. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221.

[5] The Board rejected the Trial Examiner's alternate finding that there was a refusal to bargain as of June 28, 1960, so that the strike was an unfair labor practice strike from its inception (J.A. 4a–5a, 72).

Board ordered the Company to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to reinstate with back pay all strikers not permanently replaced before December 28, 1960 (J.A. 9a–11a, 66a–68a).[6]

B. THE COURT OF APPEALS DECISION

The court of appeals sustained the Board's unfair labor practice findings and enforced the reinstatement and back pay provisions of its order. In so concluding, the court (with one judge dissenting) rejected the Company's contention that the Board's findings were based on events which occurred more than six months before the filing and service of the charges, and thus were barred by Section 10(b) of the Act. (Pet. 1a–32a.)[7]

ARGUMENT

Petitioner's sole contention is that the Board's unfair labor practice findings were barred by Section 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the

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[6] The Board found, however, that striker Harris, though not replaced before that date, had engaged in misconduct which disqualified him for reinstatement (J.A. 9a).

[7] Although sustaining the Board's finding of a refusal to bargain on and after December 28, 1960, the court declined to enforce the Board's bargaining order (Pet. 27a–29a). The propriety of this action is challenged by the Union in a separate petition. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, etc.* v. *The Philip Carey Manufacturing Company, et al.*, No. 370, this Term.

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charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The court below properly rejected this contention and there is no occasion for further review.

1. Petitioner contends that the Board's finding of a refusal to bargain on and after December 28, 1960 is not supported by a valid charge, since there was no charge specifically covering this matter and the charges filed prior to that date (see pp. 7–8, *infra*) allegedly provided an inadequate basis for the finding (Pet. 22–29).[8] As the court below correctly concluded (Pet. 20a–22a), *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, refutes this contention.

In *Fant* a charge was filed in May 1954 alleging that the company had refused to bargain in good faith during negotiations it had had with the union in the preceding several months. While this charge was pending, but before the complaint issued, the company without consulting the union put into effect a general wage increase. A complaint then issued charging that the company had refused to bargain

[8] It would appear that this argument is barred by Section 10(e) of the Act, which provides that no "objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Although the Trial Examiner found that there was an unlawful refusal to bargain on and after June 28, 1960, he also made the alternative finding that there was a refusal to bargain on and after December 28, 1960 (n. 5, p. 4, *supra*). Petitioner, though filing exceptions with the Board to the Examiner's adverse findings, including his alternative finding, did not raise any issue as to whether the latter finding was barred by Section 10(b).

(1) by its actions in the prior negotiations and (2) through the unilateral wage increase. This Court held that the charge relating to the earlier negotiations was also sufficient to support a complaint on the subsequent unilateral wage increase. Noting that the purpose of a charge filed with the Board "is merely to set in motion the machinery of an inquiry" (360 U.S. at 307), the Court held that the Board was not restricted "to the precise particularizations of a charge," but could include in the complaint "'unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' *National Licorice Co.* v. *Labor Board,* 309 U.S. 350, at 369." The Court pointed out (360 U.S. at 307) that "[i]n the present case, as in *National Licorice,* the unilateral wage increase was 'of the same class of violations as those set up in the charge * * *.' The wage increase was 'related to' the conduct alleged in the charge and developed as one aspect of that conduct 'while the proceeding [was] pending before the Board.'"

By the same reasoning, the Board was justified in this case in including in the complaint, as one of the illegal refusals to bargain, the Company's conduct on and after December 28, 1960, even though that conduct was not the subject of the earlier charges. Prior to December 28, 1960, three related charges of refusal to bargain had been filed with the Board and served upon the Company. The first, served on September 26, 1960, alleged that, in the negotiations after the Union's certification, the Company had re-

fused to bargain in good faith in violation of Sections 8(a)(5) and (1) of the Act, and that this unlawful action had caused the strike of September 6, 1960 (J.A. 628a-631a). An amendment to this charge, served on October 21, 1960, added that the Company further refused to bargain by sending a letter to the employees on September 26, which threatened permanent replacement of the striking employees and a withdrawal of certain agreements which had been reached during negotiations (J.A. 636a-639a). A third charge, served on December 8, 1960, alleged that, on and after November 22, 1960, the Company had refused to bargain in good faith and had discriminated, in violation of Sections 8(a)(1), (3) and (5) of the Act, by refusing to furnish wage information, by failing to grant the strikers vacation pay to which they were entitled, and by other conduct—and thus had forced a continuation of the strike started on September 6, 1960 (J.A. 640a-643a). These charges, all of which alleged a refusal to bargain, were sufficient "to set in motion" the Board's investigation of the bargaining negotiations between the parties and justified the issuance of a complaint based not only on the precise events alleged in the charges, but also on any subsequent events which grew out and were closely related to the events specified in the charges. *Fant Milling Co., supra.* The refusal to bargain on December 28, 1960, by insisting on an unlawful superseniority provision, clearly grew out of the bargaining negotiations which were the basis of the earlier charges, and was "of the same class of violations"

(*Fant, supra*) as the other acts which were specified in the charges.[9] Accordingly, in the complaint which issued on July 28, 1961 (J.A. 653a-661a), the Board could properly encompass the Company's action in regard to superseniority.[10]

Fant cannot be distinguished, as petitioner attempts to do (Pet. 24–26), on the ground that there the subsequent event (a unilateral wage increase) was merely further evidence of the original violation charged (i.e., a lack of good faith in the bargaining), and the Board held that the original violation had been committed (Pet. 24–26). For, as we have noted, the rationale of *Fant* is that the purpose of a charge "is merely to set in motion the machinery of an in-

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[9] Indeed, the October 21 charge made specific reference to the Company's letter of September 26, wherein it first announced its intention to seek superseniority for returning strikers and their replacements (see n. 3, p. 3, *supra*).

[10] There is no substance to petitioner's suggestion (Pet. 22) that the complaint did not allege the illegality of the Company's insistence on superseniority. Although the complaint did not specifically pinpoint the Company's action to the date found by the Board, *i.e.*, December 28, 1960, it asserted the illegality of the superseniority policy at least twice—once in referring to the Company's letter of September 26 (J.A. 656a–657a), and again in concluding that, at all times since October 4, the Company had given effect "to a policy of granting returning strikers and replacements special seniority rights (superseniority) for purposes of layoff and recall" (J.A. 660a). These references in the complaint, coupled with the fact that the events at the bargaining session of December 28, 1960, were developed fully at the hearing, clearly afforded petitioner adequate notice that the impact of superseniority on the negotiations was in issue in the proceeding. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350–351.

quiry," but that once "its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it"—subject to the qualification that the Board may not add matter which is totally unrelated to the events specified in the charge. 360 U.S. at 307–309. Even where, as in the present case, the events specified in the charge are held not to constitute an unfair labor practice, the charge nevertheless serves its function of setting the Board's inquiry in motion. Once that inquiry has been started, it would defeat the public purposes of the Act, and serve no legitimate private interest, to bar the Board from remedying subsequently discovered unfair labor practices which are closely related to the events particularized in the charge, merely because the latter events do not themselves actually amount to an unfair labor practice.

2. Likewise without merit is petitioner's further contention (Pet. 7–22) that there is no valid charge supporting the Board's finding that the refusal to reinstate the strikers in August 1961 was unlawful. That refusal was challenged in a charge served on September 12, 1961 (J.A. 643a–652a). Petitioner argues, however, that this charge may not serve as a basis for condemning the refusal to reinstate. The argument is that the latter action was unlawful only if the strike was caused or prolonged by unfair labor practices, and that the unfair labor practice which the Board found had that effect—the refusal to bargain on December 28, 1960—occurred more than six

months before the filing and service of the September 1961 charge.

The Board (J.A. 14a–15a) and the court below (Pet. 22a–23a) properly rejected this argument. As shown above, the September 1961 charge does not stand alone. The first charge filed in September 1960, although alleging only an unlawful refusal to bargain, asserted that such unfair labor practice had caused the strike on September 6. The charge filed in December 1960 added an allegation that petitioner had discriminated in violation of Section 8(a)(3) of the Act, and asserted that the Company's unfair labor practices had caused or prolonged the strike. In these circumstances, the Company was placed on notice from the beginning, and within six months of the strike, that it would have to defend against the charge that the strikers were unfair labor practice strikers. The policy of Section 10(b) is merely "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.'" *Local Lodge No. 1424 (Bryan Mfg. Co.)* v. *National Labor Relations Board*, 362 U.S. 411, 419. In view of the charges that were filed here, that policy was satisfied even though there was no charge, within six months of the strike, which specifically alleged a discriminatory refusal to reinstate the strikers.

There is no conflict of decisions. In *Local Lodge No. 1424, supra*, the union and the employer entered into a union security agreement at a time when the

union did not represent a majority of the employees; a charge which was filed more than six months later alleged that the continued maintainance of the agreement was violative of the Act. This Court held that the charge was barred by Section 10(b). It reasoned that, since the only thing which occurred within the limitations period was the enforcement of a union security contract valid on its face, the contract could be "impeached" only by referring to the union's lack of majority at the time of execution—a situation which existed more than six months prior to the filing of the charge. Here, on the other hand, the illegality of the refusal to reinstate the strikers in August 1961 was not dependent solely upon events outside the 10(b) period. The charges filed in September and December 1960 raised, in timely fashion, the issue that the unfair labor practices caused the strike, and that issue, and its effect on the subsequent refusal to reinstate the strikers, was properly cognizable in the instant proceeding.

Greenville Cotton Oil Co., 92 NLRB 1033, affirmed, *sub nom. American Federation of Grain Millers* v. *National Labor Relations Board*, 197 F. 2d 451 (C.A. 5), is also distinguishable on its facts. There, a charge alleging an unlawful refusal to reinstate certain strikers was held barred by Section 10(b), since the refusal was wrongful only if it could be established that, outside the limitations period, the employer had unlawfully refused to recognize and bargain with the union. Here, as we have shown,

the issue of the illegality of the strike was raised in timely fashion by the earlier charges, and hence brought within the 10(b) period. The situation here is thus more analogous to that in *National Labor Relations Board* v. *Brown and Root, Inc.*, 203 F. 2d 139, 145–146 (C.A. 8), where it was held that the complaint was not barred by Section 10(b).[11]

Finally, petitioner suggests that the August 1961 charge could not, in any event, support a finding of discrimination against the strikers, because such discrimination occurred, not when the strikers were denied reinstatement in August, but in February 1961 when the Company notified the Union of all the strikers who had been "permanently replaced" (Pet. 14–17). Since the earliest days of the Act, however, it has been recognized that, although an

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[11] In *Brown and Root*, a timely charge was filed alleging a refusal to bargain, and the Board sustained the charge. Meanwhile, a strike ensued, and the strikers were refused reinstatement at the conclusion of the strike. A new charge was filed, more than six months after the refusal to bargain, alleging that the strike was caused by that unfair labor practice and hence the refusal to reinstate the strikers was improper. The Board held, and the Eighth Circuit agreed, that, since the first charge had raised the refusal to bargain issue in timely fashion, and indeed it had already been litigated in a separate proceeding, the Board could, without violating Section 10(b), take that issue into account in the second proceeding, in assessing the propriety of the refusal to reinstate the strikers.

Davis Fire Brick Co., 131 NLRB 393 (Pet. 12–13), is not to the contrary. As the Board pointed out (J.A. 15a, n. 16), "in that case, the Board's longstanding policy of honoring settlement agreements precluded it * * * from relying on any acts antedating such agreement in order to prove any subsequent unfair labor practices, such as the refusal to reinstate the strikers." No such factor is involved here.

economic striker is not entitled to regain his job if he has been permanently replaced prior to his unconditional application for reinstatement, an unfair labor practice striker is entitled to his job despite such replacement; and that an employer illegally discriminates by refusing to reinstate an unfair labor practice striker when he abandons the strike and makes an unconditional application for reinstatement.[12] It may also be unlawful to discharge an unfair labor practice striker prior to his application for reinstatement, but this is a separate and independent act of interference with employee rights, and does not lessen the discrimination involved in subsequently refusing his application for reinstatement.[13]

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[12] See *Black Diamond Steamship Corp.*, 3 NLRB 84, enforced, 94 F. 2d 875, 879 (C.A. 2), certiorari denied, 304 U.S. 579; *Denver Automobile Dealers Ass'n*, 10 NLRB 1173, 1208–1210; *Crosby Chemicals, Inc.*, 85 NLRB 791, 797–799. See also, *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928 (C.A. 2).

[13] See *Deena Artware, Inc.*, 86 NLRB 732, 773–774; *Knight Morley Corp.*, 116 NLRB 140, 148–149; *Mastro Plastics Corp.*, 103 NLRB 511, 562; *Cactus Petroleum, Inc.*, 134 NLRB 1254, 1260–1261. Cf. *Stackpole Carbon Co.*, 6 NLRB 171, 197–199.

The cases cited by petitioner (Pet. 15–21) are inapposite, for none involves an unfair labor practice strike situation. *Bowen Products Corp.*, 113 NLRB 731, simply holds that, where a layoff follows automatically from a reduction in seniority which was effected outside the limitations period, the gravamen of the violation for the purposes of Section 10(b) is the earlier reduction. However, the *Bowen* rule is not applicable where a layoff or discharge is also attributable to other circumstances existing within the 10(b) period, which are sufficient to establish an additional independent violation of the Act. *Whiting Milk Corp.*, 145 NLRB No. 103; *Potlach Forests, Inc.*, 87

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1964.

NLRB 1193, 1210. While *Bartlett-Collins Co.*, 110 NLRB 395, holds that *economic* strikers may be treated as new employees after they are replaced, it is clear that *unfair labor practice* strikers may not. *Robinson Freight Lines*, 114 NLRB 1093, 1096; *Fitzgerald Mills Corp.*, 133 NLRB 877, 886. Similarly, though permanently replaced *economic* strikers were not considered employees for the purpose of the old Section 9(c)(3), *Rowe-Jordan Furniture Corp.*, 81 NLRB 190, that rule did not apply to *unfair labor practice* strikers. *Times Square Stores Corp.*, 79 NLRB 361, 364. Finally, in *Knickerbocker Mfg. Co.*, 109 NLRB 1195, the Board simply found, as a matter of fact, that the applications for employment by four employees within the 10(b) period were in fact merely requests for the reconsideration of discharges consummated before the period, and thus were incapable of supporting a finding of unlawful discrimination.

U.S. GOVERNMENT PRINTING OFFICE: 1964